Reserved Judgment

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Criminal Appeal No. 69 of 2003

Smt. Dayawati
W/o Shri Jagram,
R/o Village Gulabrai,
P.S. Rudraprayag,
District Rudraprayag.

……. Appellant (in Jail)

Versus

The State of Uttaranchal ….. Respondent

Mrs. Pushpa Joshi, Adv./ Mr. R.P. Nautiyal, Advocate for the appellant.
Mr. Nandan Arya, Asstt. Government Advocate assisted by
Mr. S.A. Siddiqui, Brief Holder for the respondent-State.

Coram: Hon'ble Irshad Hussain, J.
Hon'ble Prafulla C. Pant, J.

Dt: 26 April, 2005.

[Per Hon'ble Prafulla C. Pant, J.]

This appeal, preferred under Section 374 of the Code of Criminal Procedure, 1973, is directed against the judgment and order dated 13th February, 2003 passed by learned Sessions Judge, Rudraprayag, in Session trial No. 30 of 2002 whereby, the appellant Dayawati has been convicted under Section 302 of the Indian Penal Code, 1860 (for brevity hereinafter the Code) and sentenced to life imprisonment.

2) The prosecution story, in brief, is that on 27.09.2002, complainant Afzal Ali (P.W. 1) alongwith his wife Manora Begum (P.W. 2) had gone to meet Panchayat Minister, Shri

Kimothi in connection with preparation of the papers of scholarship of their daughter Ms. Illu. They left their another minor daughter Ms. Shabbo alias Bulla in their home all alone. Her neighbour Monu alias Manish (a minor son of appellant Dayawati), getting an opportunity committed rape on the minor girl. To conceal the offence committed by her son, Smt. Dayawati (appellant), with the help of her son poured kerosene oil over Ms. Shabbo @ Bullu and burnt her alive. The complainant while returning after meeting the Minister, when reached near military camp, a police vehicle came to him and told him that his daughter Ms. Shabbo @ Bulla with burn injuries was admitted in the hospital. When he rushed to the hospital at about 12:00 noon, he was told by the victim-girl about the incident. On this the complainant lodged the First Information Reprot (Ext. A-1) on the very day i.e. 27.09.2002 at about 14:30 hours. The check report (Ext. A-6) of the First Information Report was prepared by the police on the basis of the report given by the complainant. An entry to that effect was made in the general diary (copy of extract of which is Ext. A -7) at the police station Rudraprayag. A crime number 542 of 2002 was registered initially under Section 307/376 of the Code against accused-appellants Dayawati, her husband Jagram and her minor son Monu @ Manish. In the Government hospital Rudraprayag where the victim girl was admitted, DR. Sanjay Jain (P.W.4) recorded in the medical report (Ext. A -3) that when the girl was brought to him at 1:10 P.M. on 27.09.2002, she had 90-95 per cent burn injuries. But she was in a position of giving dying declaration. In the dying declaration (Ext. A -4) recorded by Tehsildar on 27.09.2002, Ms. Shabbo @ Bullu has stated categorically that Manish Godiyal committed rape on her. She has further stated that his mother Dayawati (appellant) thereafter poured kerosene oil on her and with the light of matchstick, burnt her. Ms. Shabbo @

Bullu later succumbed to her injuries on 28.09.2002 in Sri Nagar Base hospital at about 6:30 P.M. where she was referred from Rudraprayag.

3) After death of the victim, the police took her dead body into their possession and prepared inquest report (ext. A -2, extra copy A -15). After preparing necessary letters and papers for postmortem examination, the body of the victim was sent for autopsy. The autopsy was conducted on 28.09.2002 at about 02:00 P.M. at Pauri by Dr. Sanjeev Prakash (P.W. 8) with another Doctor, Mr. P.D. Chaudhary. The postmortem report, Ext. A -17), shows that the deceased was aged 13 years and death have occurred on the same day (28.09.2002) in the morning at about 06:30 A.M. Her eyes were partially found opened. Following ante mortem injuries were recorded by the two doctors:

i) Whole body burnt (saptodeep except both sole and small lateral portion of both foot and lower part of both legs.

ii) Singering of hair, line of redness present.

On the joints and bones nothing abnormal was found. On internal examination nothing abnormal inside the scalp found. Membranes where found congested. Brain too was congested. Spinal cord not opened. Nothing abnormal was found in the ribs. Larynx and trachea found congested – mucosal. Lungs-congested. Heart – partially filled. Teeth – 15/15. Abdomen – empty. Small intestine – filled. Gall bladder – congested. Spleen – congested. Kidneys – congested. Urinary bladder – empty. In the opinion of the doctors cause of death was shock due to ante mortem burn injuries.

4) The Investigating Officer, Vishram Singh (P.W. 6) after recording the statements of the witnesses, prepared the site plan (Ext. A -8), recovery memo of the burnt clothes (Ext. A -9) and on completing the investigation, submitted the chargesheet (Ext. A -14) against all the three accused namely, Monu @ Manish (minor), Smt. Dayawati (appellant) and Jagram before the concerned Magistrate.

5) It appears that the case of the Juvenile was separated from that of Smt. Dayawati (appellant) and Jagram. The case of Smt. Dayawati and her husband Jagram, after the necessary copies were given to them was committed to the court of Session Judge, Rudraprayag which was registered as Sessions Trial No. 30 of 2002. The learned Session Judge after hearing the parties framed charge under Section 302 / 34 of the Code against Smt. Dayawati (appellant) and her husband Jagram, who in response to the charge pleaded not guilty and claimed to be tried. Thereafter, the prosecution got examined P.W. 1, Afzal Ali (informant); P.W. 2, Manora Begum (mother of the deceased); P.W.3, Ashok Kumar; P.W. 4, Dr. Sanjay Jain; P.W. 5, Uttam Singh Chauhan (Naib Tehsildar); P.W. 6, Vishram Singh (investigating Officer); P.W. 7, Smt. Uma Madhwal (Station House Officer) and P.W. 87, Dr. Sanjeev Kumar (who performed the autopsy with another doctor, Mr. P.D. Chaudhary). The documentary, oral evidence alongwith the material exhibits were put to the accused persons namely, Dayawati (appellant) and her husband Jagram, to which they alleged the evidence to be false. Accused Jagram in his statement under Section 313 of the Code of Criminal Procedure, 1973 submitted to the Court that on the date of incident he was on his duty and not even present at the scene of occurrence. On behalf of the defence D.W. 1, Kailash was examined, who corroborated the plea of accused Jagram that on

27.09.2002, Jagram was with him in the office of the District Inspector of Schools and in the market. The learned Session Judge after hearing the parties and after going through the record found charge against Jagram not proved and acquitted him. Only Smt. Dayawati was found guilty of offence punishable under Section 302 of the Code and after hearing her on punishment, sentenced her to life imprisonment. Aggrieved by which this appeal has been preferred.

6) We heard learned counsel for the appellant and learned Assistant Government Advocate at length and perused the entire evidence on record.

7) P.W. 1, Afzal Ali (informant and father of the deceased) stated that on 27.09.2002 he had gone with his wife to meet the Panchayat Minister in connection with scholarship of her daughter, Illu and on his way back near military bend, the Station Officer, who was in a Jeep met him and told him that his daughter is in the hospital. Immediately the parents of the deceased rushed to the hospital and found that their daughter in a burnt condition giving statement to the doctor and one another officer. This witness further states that his daughter Ms. Shabbo @ Bullu in a burnt condition told him that Monu @ Manish, son of the appellant, committed rape on her whereafter Smt. Dayawati (mother of Monu) poured kerosene oil on her at about noon and burnt her. This witness further states that the case of Monu is proceeding before the Juvenile Court. P.W. 1, Afzal Ali further states that he got the First Information Report (Ext. A -1) lodged with the police. Statement of this witness is corroborated by P.W. 2, Smt, Manora Begum (mother of the deceased). P.W. 3, Ashok Kumar has only corroborated the fact that he had seen Shabbio in a burnt condition in Rudraprayag hospital and later when he went to Sri Nagar Base

Hospital, he found her dead and he signed the inquest report (Ext. A -2). P.W. 4, Dr. Sanjay Jain who was Medical Officer in Rudraprayag has stated that on 27.09.2002 when Ms. Shabbo, daughter of Afzal Ali was brought to him she was found having burn injuries to the extent of 90-95 per cent. This witness proved the medical report (Ext. A -3) and stated that he referred the patient to Sri Nagar Base Hospital. At the end of his examination-in-chief this witness states that when the patient was in Rudraprayag hospital she told him that she was raped. But on cross-examination he clarifies that he was not told name of the accused but did disclose the she was burnt.

8) The above evidence on record, (except the dying declaration) shows that there is only circumstantial evidence and there is not ocular evidence given by witnesses before court as to the fact of commission of crime by the appellant. In such circumstances, the dying declaration of the deceased is the most material and important evidence. The contents of the dying declaration (Ext. A -4) are being reproduced as under:

eR;q dkfyd c;ku

^^izekf.kr fd;k tkrk gS fd dq0 lCcw jkuh c;ku nsus ls lkwoZ iw.ka gks”kgokl esa gS rFkk c;ku nsus dh vPNh fLFkfr esa gSA

¼g0 fpfdRlkf/kdkjh½

fnukad 27-9-2002 le; 1-15-P.M.

LFkku fpfdRlky; :nziz;kx

dqå lCcw jkuh mQZ cqYyw mez 13 lky iq=h vQty vyh irk xqykcjke :nziz;kx

^^ c;ku%& esjs lkFk euh"k xksfM;ky us cykRdkj fd;k gS] mldh eka us dgk fd gekjs ifr ds lkFk Hkh djks rks eSus euk fd;k rks mldh eka us esjs Åij rsy ¼feVVh½ dk Mkydj ekfpl ls vkx yxkdj eq>s tyk fn;k] eSus dgk fd vkaVh cpkvk ysfdu mUgksaus ugha cpk;kA euh"k dh eka dk uke n;k xksfM;ky gS rFkk firk dk uke txjke gS] ;s yksx fctukSj dh lkbZM ds gS rFkk iVsy ds edku lkj jgrs gSaA ;g c;ku eSa viuh lgefr ,oa bPNk ls ns jgh gwa] c;ku tks eq>s i<dj lquk;k og lgh gS] fQj dgk fd euh"k us esjs lkFk esjs ?kj esa djhc 12 cts fnu esa cykRdkj fd;k Fkk] eS dejs esa vdsyh Fkh] euh"k esjs ls cMk gS mez dk eq>s irk ugha gS] igys Hkh gekjs ?kj vkrk jgrk Fkk ;gh esjs c;ku gS] c;ku i<dj lquk;k ¼,oa le>k;k rFkk ogh fy[kk tks c;ku fd;k] c;ku ls lger gksus ij vaxqBk fu”kku djok;k x;kA**

vaxqBk

fu”kku

dq0 lCcw

jkuh

izekf.kr fd;k tkrk gS fd mijksDr c;ku esjs }kjk dq0 lCcw jkuh ds dgus vuqlkj mldh lgefr ls gh ntZ fd;k x;k gSA

rglhynkj
#nziz;kx
fna0 27-9-2002

Above dying declaration was proved by P.W.5, Uttam Singh Chauhan, Naib Tehsildar, who states that on instruction from the Sub Divisional Magistrate, Rudraprayag, he reached the hospital where Shaboo @ Bullu gave him the statement as mentioned above before Dr. Sanjay Jain (P.W.4). He has further stated that the statement given by Shabbo @ Bullu, aged

13 years was recorded by him in his own handwriting. In the cross-examination, this witness states the aforesaid dying declaration was recorded between 1:05 to 1:15 P.M. He further states that the distance between the S.D.M. Office and the hospital is barely 300 meters. He has explained that though he was not in a pay scale of Tehsildar, but he was acting as Tehsildar on local arrangement.

9) In view of the statement of P.W. 4, Dr. Sanjay Jain and P.W. 5, Uttam Singh Chauhan (Tehsildar) who had no enmity with the appellant, the dying declaration given by the deceased,

in the present circumstance of the case deserves to be believed, and in our opinion, it is rightly believed by the learned Sessions Judge, Since there was no eye witness of the incident, as such merely due to the absence of eye witness the dying declaration to the extent of commission of crime by the present appellant, cannot be disbelieved.

10) On behalf of the appellant, it is argued that P.W. 1, Afzal Ali and P.W. 2, Manora Begum have state3d that Jagram has also committed rape on the deceased, which part of the prosecution story was not belied by the learned Sessions Judge, as such their statement as to the commission of murder by the appellant should not be believed. We are unable to agree with the submission advanced on behalf of the appellant for the reason that it is the duty of the Court to separate chaff from the grain. It is possible that the two witnesses have exaggerated their statement by making statement that their daughter told them that Jagram had committed rape on her but hat by itself do not crate any reasonable doubt as to the pith and substance of the dying declaration that it was only Dayawati (mother of Monu), who poured kerosene oil on her and burnt her.

11) Learned counsel for appellant further argued that in the dying declaration it is mentioned that after Monu @ Manish committed rape on the deceased, Smt. Dayawati asked her to submit herself to rape by Jagram also. This part of the dying declaration was not believed by the learned Sessions Judge and this itself Makesh dying declaration doubtful. We are of the view that there is no doubt that the dying declaration contains above allegation but that part is separable out of the entire story narrated by the deceased in view of the plea of alibi of accused Jagram (corroborated by D.W.1, Kailash). As such, the entire dying declaration cannot be thrown away on said ground, more

particularly, when there appears no enmity of the young girl against Smt. Dayawati (appellant) nor there is any evidence on record to suggest the false implication of Dayawati by the deceased.

12) Mrs. Pushpa Joshi and Mr. R.P. Nauitiyal, learned counsel for the appellant referred to the case law reported in ***T.K. Reddy Vs. State of Andhra Pradesh; 2002 (5) SUPREME TO-DAY 542 and Heikrujam Chaoba Singh Vs. State of Manipur; 2000 SUPREME COURT CRIMINAL RULLING Pg. 143*** and contended that the dying declaration is shaky and should not be believed. We are unable to accept the contention of the learned counsel for the appellant for the reason that in the aforesaid case of T.K. Reddy, there were two different contradictory statements given by the deceased on to the Magistrate and another to the police and in that circumstance, the dying declaration was not believed. In the aforementioned another case of Heikrujam Chaoba Singh, the dying declaration was said to have been made only to the interested persons (relatives) on way to hospital and there was no corroboration. In the present case both the above case law are not applicable as neither there are two different contradictory dying declarations given by the deceased in this case nor is it a case where dying declaration is given only to the relatives.

13) In view of the above discussion and evidence on record, we are in agreement with the findings of the learned Sessions Judge that it is proved from the evidence on record that charge under Section 302 of the Indian Penal Code is established against the appellant. We are also in agreement on the quantum of sentence awarded by the learned trial court. As such, we see no force in the appeal and the same deserves to be dismissed. Accordingly, the appeal is dismissed.

(Prafulla C. Pant, J.) (Irshad Hussain, J.)

Dt. 26 April, 2005
H. Negi